

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7 DEBORAH A. HALL,)
8 Plaintiff,) No. CV-06-0004-CI
9 v.) ORDER GRANTING DEFENDANT'S
10 JO ANNE B. BARNHART,) MOTION FOR SUMMARY JUDGMENT
11 Commissioner of Social)
12 Security,)
13 Defendant.)

14 BEFORE THE COURT are Plaintiff's Motion for Summary Judgment
15 (Ct. Rec. 14) and Defendant's Motion for Summary Judgment (Ct. Rec.
16 19), noted for hearing without oral argument on August 21, 2006.
17 (Ct. Rec. 13.) Attorney Lana C. Glenn represents Plaintiff; Special
18 Assistant United States Attorney Jeffrey H. Baird represents the
19 Commissioner of Social Security ("Commissioner"). The parties have
20 consented to proceed before a magistrate judge. (Ct. Rec. 9.) After
21 reviewing the administrative record and the briefs filed by the
22 parties, the court **GRANTS** Defendant's Motion for Summary Judgment
23 (Ct. Rec. 19) and **DENIES** Plaintiff's Motion for Summary Judgment.
24 (Ct. Rec. 14.)

JURISDICTION

26 Plaintiff's applications for Supplemental Security Income and
27 Disability Insurance Benefits ("DIB") alleged an onset date of April
28 2, 2001. (Tr. 523-525, 87-89.) The applications were denied

1 initially (Tr. 46) and on reconsideration. (Tr. 47.) ALJ Mary Reed
 2 held a hearing on July 14, 2004. Plaintiff, medical expert Glen
 3 Almquist, M.D., vocational expert Deborah Lapoint, and Will
 4 Patterson, a friend of the Plaintiff, testified. (Tr. 536-633.)
 5 The ALJ issued a decision finding that Plaintiff was not disabled on
 6 December 17, 2004. (Tr. 22-37.) In her decision, the ALJ also made
 7 clear that she found no regulatory basis on which to reopen
 8 Plaintiff's previous denials of her three prior claims for
 9 disability benefits. (Tr. 22-23.) The Appeals Council denied a
 10 request for review on November 8, 2005. (Tr. 9-11). Therefore, the
 11 ALJ's decision became the final decision of the Commissioner, which
 12 is appealable to the district court pursuant to 42 U.S.C. § 405(g).
 13 Plaintiff filed this action for judicial review pursuant to 42
 14 U.S.C. § 405(g) on January 6, 2006. (Ct. Rec. 1.)

15 **STATEMENT OF FACTS**

16 The facts have been presented in the administrative hearing
 17 transcript, the ALJ's decision, the briefs of both Plaintiff and the
 18 Commissioner, and will only be summarized here.

19 Plaintiff was 47 years old on the date of the ALJ's decision.
 20 (Tr. 23, 580.) Her educational background includes obtaining a GED
 21 and attending two years of college. (Tr. 580.) Plaintiff is a
 22 certified nursing assistant. (Tr. 580.) She has worked as a nursing
 23 assistant, home attendant, fast food worker, animal breeder, horse
 24 trainer and stable attendant. (Tr. 580-587.) Plaintiff alleges
 25 disability due to left knee and bilateral shoulder problems since
 26 April 2, 2001. (Tr. 207.)

27 **SEQUENTIAL EVALUATION PROCESS**

28 The Social Security Act (the "Act") defines "disability" as

1 the "inability to engage in any substantial gainful activity by
2 reason of any medically determinable physical or mental impairment
3 which can be expected to result in death or which has lasted or can
4 be expected to last for a continuous period of not less than twelve
5 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
6 provides that a Plaintiff shall be determined to be under a
7 disability only if any impairments are of such severity that a
8 Plaintiff is not only unable to do previous work but cannot,
9 considering Plaintiff's age, education and work experiences, engage
10 in any other substantial gainful work which exists in the national
11 economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the
12 definition of disability consists of both medical and vocational
13 components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.
14 2001).

15 The Commissioner has established a five-step sequential
16 evaluation process for determining whether a person is disabled. 20
17 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is
18 engaged in substantial gainful activities. If so, benefits are
19 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
20 the decision maker proceeds to step two, which determines whether
21 Plaintiff has a medically severe impairment or combination of
22 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

23 If Plaintiff does not have a severe impairment or combination
24 of impairments, the disability claim is denied. If the impairment
25 is severe, the evaluation proceeds to the third step, which compares
26 Plaintiff's impairment with a number of listed impairments
27 acknowledged by the Commissioner to be so severe as to preclude
28 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),

1 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App. 1. If the
 2 impairment meets or equals one of the listed impairments, Plaintiff
 3 is conclusively presumed to be disabled. If the impairment is not
 4 one conclusively presumed to be disabling, the evaluation proceeds
 5 to the fourth step, which determines whether the impairment prevents
 6 Plaintiff from performing work which was performed in the past. If
 7 a Plaintiff is able to perform previous work, that Plaintiff is
 8 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
 9 416.920(a)(4)(iv). At this step, Plaintiff's residual functional
 10 capacity ("RFC") assessment is considered. If Plaintiff cannot
 11 perform this work, the fifth and final step in the process
 12 determines whether Plaintiff is able to perform other work in the
 13 national economy in view of Plaintiff's residual functional
 14 capacity, age, education and past work experience. 20 C.F.R. §§
 15 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137
 16 (1987).

17 The initial burden of proof rests upon Plaintiff to establish
 18 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
 19 v. *Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172
 20 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once
 21 Plaintiff establishes that a physical or mental impairment prevents
 22 the performance of previous work. The burden then shifts, at step
 23 five, to the Commissioner to show that (1) Plaintiff can perform
 24 other substantial gainful activity, and (2) a "significant number of
 25 jobs exist in the national economy" which Plaintiff can perform.
 26 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

27 **STANDARD OF REVIEW**

28 Congress has provided a limited scope of judicial review of a

1 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
2 the Commissioner's decision, made through an ALJ, when the
3 determination is not based on legal error and is supported by
4 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
5 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
6 "The [Commissioner's] determination that a plaintiff is not disabled
7 will be upheld if the findings of fact are supported by substantial
8 evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)
9 (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a
10 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th
11 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
12 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of*
13 *Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988).
14 Substantial evidence "means such evidence as a reasonable mind might
15 accept as adequate to support a conclusion." *Richardson v. Perales*,
16 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences
17 and conclusions as the [Commissioner] may reasonably draw from the
18 evidence" will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289,
19 293 (9th Cir. 1965). On review, the Court considers the record as
20 a whole, not just the evidence supporting the decision of the
21 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)
22 (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

23 It is the role of the trier of fact, not this court, to resolve
24 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
25 supports more than one rational interpretation, the court may not
26 substitute its judgment for that of the Commissioner. *Tackett*, 180
27 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
28 Nevertheless, a decision supported by substantial evidence will

1 still be set aside if the proper legal standards were not applied in
2 weighing the evidence and making the decision. *Brawner v. Secretary*
3 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987).
4 Thus, if there is substantial evidence to support the administrative
5 findings, or if there is conflicting evidence that will support a
6 finding of either disability or nondisability, the finding of the
7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
8 1230 (9th Cir. 1987).

9 **ALJ'S FINDINGS**

10 The ALJ found at step one that Plaintiff has not engaged in
11 substantial gainful activity during any time at issue. (Tr. 23.)
12 At step two, the ALJ found that the medical evidence established
13 that Plaintiff suffered from the severe impairments of status post
14 bilateral shoulder repair and status post left knee repair. (Tr.
15 31.) The ALJ concluded the record did not establish that Plaintiff
16 suffered from a severe mental impairment, lupus, reflex sympathetic
17 dystrophy ("RSD"), asthma, a brachial plexus injury, arthritis of
18 the spine, or rheumatoid arthritis. (Tr. 31-32.) Though Plaintiff's
19 knee and shoulder impairments are considered severe, the ALJ
20 concluded that she does not have an impairment or combination of
21 impairments listed in or medically equal to one of the Listings
22 impairments. (Tr. 32, 37.)

23 After finding Plaintiff's testimony regarding her limitations
24 not fully credible, the ALJ concluded that Plaintiff has the RFC to
25 perform a full range of exertion except that she is limited to
26 reaching or working overhead occasionally. (Tr. 34.) At step four
27 the ALJ concluded that because Plaintiff has the RFC to perform all
28 of her past work as she previously performed it, she is not

1 disabled. (Tr. 36.) Given the ALJ's conclusion at step four, she
2 was not required to proceed to step five; the ALJ elected to do so
3 as an alternative finding. (Tr. 36.) It is the Commissioner's
4 burden at step five to show that there are jobs existing in
5 significant numbers in the national economy which Plaintiff can
6 perform, consistent with her medically determinable impairments,
7 functional limitations, age and education. At step five, the ALJ
8 asked the vocational expert whether a person having the hypothesized
9 conditions that Plaintiff has could perform work in a sufficient
10 number of available jobs in the local and national economy. The VE
11 opined that the jobs of office helper, ticker seller, cashier, and
12 assembler could be performed by a person with these limitations, and
13 that a significant number of these jobs existed in the state and
14 national economy. Accordingly, the ALJ alternatively determined at
15 step five of the sequential evaluation process that Plaintiff was
16 not disabled within the meaning of the Social Security Act. (Tr.
17 36.)

18 **ISSUES**

19 Plaintiff contends that the Commissioner erred as a matter of
20 law. Specifically, she argues that (1) the ALJ erred by rejecting
21 the opinions of her treating and examining physicians, and if
22 properly credited, the ALJ would have found that Plaintiff's
23 impairments meet the requirements of a Listed impairment; (2) the
24 ALJ's residual functional capacity determination was not properly
25 supported; and the ALJ posed a flawed hypothetical. (Ct. Rec. 15 at
26 39-50.)

27 The Commissioner opposes the Plaintiff's Motion and asks that
28 the ALJ's decision be affirmed. (Ct. Rec. 20 at 14.)

DISCUSSION

A. Weighing Medical Evidence

In social security proceedings, the claimant must prove the existence of a physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated on the basis of a medically determinable impairment which can be shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical evidence of an underlying impairment has been shown, medical findings are not required to support the alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d 341, 345 (9th Cr. 1991).

13 A treating or examining physician's opinion is given more
14 weight than that of a non-examining physician. *Benecke v. Barnhart*,
15 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining
16 physician's opinions are not contradicted, they can be rejected only
17 with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821,
18 830 (9th Cir. 1996). If contradicted, the ALJ may reject an opinion
19 if he states specific, legitimate reasons that are supported by
20 substantial evidence. See *Flaten v. Secretary of Health and Human*
21 *Serv.*, 44 F. 3d 1453, 1463 (9th Cir. 1995). In addition to medical
22 reports in the record, the analysis and opinion of a non-examining
23 medical expert selected by an ALJ may be helpful to the
24 adjudication. *Andrews v. Shalala*, 53 F. 3d 1035, 1041 (9th Cir. 1995)
25 (citing *Magallanes v. Bowen*, 881 F. 2d 747, 753 (9th Cir. 1989)).
26 Testimony of a medical expert may serve as substantial evidence when
27 supported by other evidence in the record. *Id.*

28 Plaintiff contends that the ALJ erred by rejecting the opinions

1 of treating physicians Graeme French, M.D., and Alex Verhoogen,
2 M.D., in favor of the unsupported opinion of the testifying medical
3 expert, Glen Almquist. (Ct. Rec. 15 at 44-47.) The Commissioner
4 responds that the ALJ properly rejected both doctors' opinions for
5 specific and legitimate reasons, namely, that objective test
6 results and examining physicians' opinions support Dr. Almquist's
7 opinion. (Ct. Rec. 20 at 8-9.)

8 Plaintiff saw orthopedist Dr. Alex Verhoogen for knee problems
9 on October 25, 2001. He suspected she had a torn meniscus and
10 recommended arthroscopy. (Tr. 369, 372-373.) Arthroscopy proved Dr.
11 Verhoogen's suspicion was incorrect; he used a thermal technique to
12 shrink Plaintiff's lax anterior cruciate ligament and lysed a
13 synovial plica in her knee instead.¹ Nearly three months later, on
14 February 14, 2002, Dr. Verhoogen opined that Plaintiff was doing
15 very well. Her knee was almost asymptomatic except for what she
16 described as a feeling of residual weakness. (Tr. 378.) Dr.
17 Michael Barnard noted at an IME three months later² that Plaintiff
18 told him Dr. Verhoogen "put her on strict restrictions at work and
19 that they are 'written down,'" but Dr. Barnard points out that he
20 saw no restrictions in the documents he reviewed. (Tr. 359.) By
21 April 9, 2002, Dr. Verhoogen opined that Plaintiff could work full
22 time as either a cashier or a home attendant. (Tr. 380.) As of June
23 18, 2002, Dr. Verhoogen planned no further treatment. (Tr. 385.) He

25 ¹Dr. Verhoogen performed arthroscopic surgery and repair on
26 November 21, 2001. (Tr. 374.)

27 ²Dr. Barnard performed the evaluation on May 20, 2002. (Tr.
28 355-368.)

1 did not see Plaintiff again but opined on August 24, 2004, that she
2 was totally and permanently disabled from working full time, due not
3 only to knee and shoulder problems but because she also suffered
4 from lupus, emotional dysfunction, rheumatoid arthritis of the spine
5 and chronic low back pain. (Tr. 502-503.)

6 Plaintiff claims the ALJ also failed to properly credit Dr.
7 French's opinion. With respect to her shoulder problems, Dr. French
8 noted on March 13, 2002, that Plaintiff's use of crutches for eight
9 and a half months "really flared her right shoulder up." (Tr. 407.)
10 Dr. French felt that Plaintiff suffered a fairly severe brachial
11 plexus injury which completely resolved before she began using
12 crutches. (Tr. 407.) He diagnosed a right compression brachial
13 plexopathy and right cubital tunnel, recommended physical therapy,
14 and prescribed Dilantin and Neurontin. (Tr. 407.) Plaintiff later
15 told Dr. Barnard she did not take these medications because
16 insurance would not pay for it. (Tr. 360.) Right shoulder X-rays
17 taken the day of Dr. French's exam revealed a possible impingement
18 syndrome. (Tr. 421.)

19 A month later Dr. French diagnosed a Grade II anteromedial
20 rotary instability of the left knee, chronic, and instructed
21 Plaintiff in exercises. (Tr. 410.) He found full range of motion
22 with no laxity of crepitus in Plaintiff's shoulder joint. (Tr. 410.)
23 By this time, Dr. French believed that Plaintiff's nerve symptoms
24 "are entirely related to her shoulder instability event [a car
25 accident] of five years ago" and she "clearly has some residual
26 scarring around the brachial plexus, which caused her to have
27 brachial plexopathy when she was on the crutches." He felt that
28 Plaintiff's shoulder was recovering satisfactorily. (Tr. 410.)

1 Nine months later, however, Dr. French performed reconstructive
2 surgery on Plaintiff's left shoulder.³ (Tr. 399.) At that time,
3 Plaintiff's knee was "completely stable." (Tr. 399.) Following
4 shoulder surgery, Dr. French felt Plaintiff's prognosis was good and
5 she would likely be partially disabled for six months. (Tr. 401.) A
6 week after Dr. French operated on her shoulder, Plaintiff sought
7 treatment at an emergency room for a rash and said that she had no
8 real pain in her shoulder at the surgery site. (Tr. 403.) Dr.
9 French noted that six months after shoulder surgery Plaintiff
10 shoveled sand in her yard and chased her grandson; he felt that when
11 her knee completely healed she would have no restrictions. (Tr.
12 441.)

13 On February 27, 2004, Dr. French opined that Plaintiff's
14 ability to sit was not impaired. (Tr. 450.) He noted that
15 Plaintiff has asthma although there is no treatment documented, can
16 stand or walk 6 hours out of 8, can frequently lift 20 pounds, has
17 limited manipulative functions, and can never kneel, crouch, crawl
18 or stoop. (Tr. 450-452.) On June 30, 2004, Dr. French opined that
19 Plaintiff could occasionally lift or carry 10 pounds, and could lift
20 less than 10 pounds frequently. (Tr. 463.) Later in the same
21 assessment, Dr. French indicated that Plaintiff could lift 5 pounds
22 (from "rarely" up to "one third of a work day") and 3 pounds (for
23 durations ranging from "one third to two thirds of a work day").
24 (Tr. 467.) He opined Plaintiff could stand or walk less than 2 hours
25 of eight due to systemic lupus. (Tr. 463, 467.) He again found

27 ³Dr. French performed shoulder surgery on January 16, 2003.
28 (Tr. 399-401.)

1 Plaintiff's ability to sit was not affected, and again assessed
2 limitations in all manipulative functions. (Tr. 464-465.)

3 The ALJ relied in part on the results of Dr. Barnard's IME⁴
4 when she assessed the opinions of Drs. Verhoogen and French.
5 Plaintiff told Dr. Barnard she was receiving no treatment for her
6 shoulders and took no prescription medications, but was receiving
7 ongoing physical therapy for her left knee due to "atrophy" and
8 weakness. (Tr. 360.) Dr. Barnard observed no atrophy in the
9 Plaintiff's left thigh. (Tr. 364.) When he examined her left knee,
10 Dr. Barnard found limited range of motion until he distracted her;
11 Plaintiff's left knee had full range of motion when her attention
12 was distracted. (Tr. 364.) Dr. Barnard opined that Plaintiff had
13 reached maximum medical improvement. "She has no evidence of
14 atrophy in her lower extremities whatsoever, and it appears that her
15 atrophy has resolved at this time, requiring no further intervention
16 with physical therapy. No treatment is recommended at this time. The
17 claimant is fully recovered from her knee injury." (Tr. 366.) With
18 respect to Plaintiff's shoulder problems, Dr. Barnard disagreed with
19 Dr. French's diagnosis because he found no evidence of brachial
20 plexopathy or of thoracic outlet syndrome. (Tr. 366.) Dr. Barnard
21 opined that Plaintiff was capable of returning to her full-time job
22 as a nursing assistant. (Tr. 367.)

23 The ALJ also relied on the opinions of Meredith Heick, M.D.,
24 when she assessed the opinions of Drs. Verhoogen and French. Dr.
25 Heick examined Plaintiff on June 21, 2004. (Tr. 476.) Plaintiff told
26

27 ⁴Dr. Barnard performed his evaluation on May 20, 2002. (Tr.
28 355-367.)

1 Dr. Heick she was diagnosed with lupus in the past, but it had been
2 in remission for ten years; she had not seen a rheumatologist during
3 that time. (Tr. 476.) Dr. Heick's examination revealed no sign of
4 active lupus but tests were ordered. (Tr. 479.) On June 30, 2004,
5 Dr. Heick advised Plaintiff that laboratory test results also showed
6 no active sign of lupus. (Tr. 485.)

7 The ALJ also relied on the testimony of Dr. Almquist when she
8 assessed the opinions of Drs. Verhoogen and French. Dr. Almquist
9 testified that the record does not reveal why Plaintiff needed
10 crutches for eight and a half months. (Tr. 558.) He opined that
11 even a more severe injury, such as "a fracture of the plateau of the
12 tibias of the knee," would likely result in using crutches for only
13 three months until a patient would begin bearing weight. (Tr. 558-
14 559, 570.) Dr. Almquist observed that Plaintiff's reported diagnosis
15 of lupus was contradicted by a lack of medical treatment for it for
16 ten years, and by recent negative exam and test results. (Tr. 546,
17 551, 555.) With respect to credibility, he testified that doctors
18 noted some evidence of pain behavior during Plaintiff's evaluations
19 such as describing tenderness everywhere she was touched in her
20 shoulder area, despite normal sensory examination and full range of
21 motion. (Tr. 551-552.) When the ALJ asked whether any of the
22 impairments alone or in combination met the requirements of the
23 Listed impairments, Dr. Almquist opined that Plaintiff's left knee
24 problem presented the most severe impairment, but he did not believe
25 that it met the requirements of Listing 102A (degenerative
26 arthritis, deformity or instability of a weight bearing joint),
27 because, after surgery, the knee was stable and without problems.
28 (Tr. 556.) Dr. Almquist then considered Plaintiff's shoulder

1 impairment under Listing 102B (instability of an upper extremity)
2 and found that the requirements were not met because after surgery,
3 no shoulder instability was established. (Tr. 556.) Dr. Almquist
4 observed that Plaintiff's knee and shoulder surgeries are of the
5 type that normally allow a person to return to work within 3 to 4
6 months and to their highest activity level within one year. (Tr.
7 566.)

8 With respect to Plaintiff's assertion that her impairments meet
9 or equal one of the Listings, the ALJ took into account Dr.
10 Almquist's testimony that an MRI of Plaintiff's knee in September of
11 2002 was normal, doctors found no atrophy after Plaintiff recovered
12 from using crutches, and examinations revealed no deformity of the
13 weight bearing joints or instability. (Tr. 29.) The ALJ credited Dr.
14 Almquist's observation that in July of 2003, examination revealed
15 that Plaintiff's left knee was perfect and she had full range of
16 motion in her left shoulder. (Tr. 29, relying on Tr. 554, 444.) The
17 ALJ accepted Dr. Almquist's conclusion that Plaintiff is capable of
18 fully using her shoulder and is limited only to the extent that if
19 she works above shoulder height it must be limited to occasionally.
20 (Tr. 29.)

21 The ALJ pointed out that in March of 2002, Plaintiff lifted 47
22 pounds from floor to waist and 30 pounds to her chest in physical
23 therapy. (Tr. 35.) The ALJ continued:

24 Dr. Barnard opined she had fully recovered from her knee
25 injury and was capable of returning to her job as a
nursing assistant (a medium exertion job) on a full time
26 basis. A reported re-injury occurred during an independent
medical exam with Dr. Barnard, however, Dr. Verhoogen
27 reported this should be temporary. Brachial plexus
examination was normal, MRI of the right knee was within
28 normal limits, and range of motion of the right shoulder
was normal post operatively. Left shoulder revealed no

1 swelling or tenderness on examination by Dr. Heick,
2 although the claimant reported pain on motion.

3 (Tr. 35.)

4 The ALJ gave at a minimum three specific reasons for rejecting
5 Dr. Verhoogen's August 2004 opinion that Plaintiff could not work:
6 (1) Dr. Verhoogen based his opinion of disability partly on the
7 assumption that Plaintiff suffered from lupus, an assumption not
8 supported by the record; (2) Dr. Verhoogen last saw Plaintiff in
9 June of 2002, when he released her to work; yet neither the
10 intervening record nor Dr. Verhoogen's 2004 opinion reveal what
11 changed his opinion that Plaintiff could perform light work in 2002
12 but not in 2004; and (3) in 2004 Dr. Verhoogen opined that emotional
13 problems probably impacted Plaintiff's ability to return to work,
14 although none of his previous chart notes reflected mental or
15 emotional difficulties. (Tr. 35, 503.)

16 The ALJ rejected Dr. Verhoogen's last opinion because it was
17 inconsistent with other physicians' opinions (such as Drs. Heick,
18 Barnard, and Dr. Almquist); was inconsistent with his earlier
19 opinion that Plaintiff could perform some light jobs, and he did not
20 explain the change; and, with respect to mental impairments, was
21 inconsistent with Dr. Verhoogen's own earlier chart notes and with
22 the records of other physicians because prior records did not
23 document mental impairments. Each is a specific and legitimate
24 reason for the ALJ's rejection of Dr. Verhoogen's opinion that
25 Plaintiff could not work. When presented with conflicting medical
opinions, the ALJ must determine credibility and resolve the
conflict. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992).

28 The ALJ similarly discounted Dr. French's opinion Plaintiff was

1 limited to sedentary work because he based this opinion on the
2 mistaken belief that Plaintiff suffered from lupus and a brachial
3 plexus injury, both unsupported by the record. (Tr. 35.) The ALJ
4 notes that even Dr. French eventually opined that Plaintiff did not
5 suffer a brachial plexus injury. (Tr. 31.) The opinions of treating
6 physicians French and Verhoogen are further contradicted by
7 examining physicians Barnard, Heick and Charles Larson, M.D., by the
8 results of objective testing, and by Dr. Almquist. The ALJ gave
9 specific and legitimate reasons for rejecting the severe limitations
10 assessed by Plaintiff's treating physicians. The ALJ's weighing of
11 the medical evidence is supported by substantial evidence in the
12 record as a whole and is free of legal error.

13 **B. Residual Functional Capacity (RFC)**

14 In this case, the ALJ pointed out the factors she was required
15 to consider when determining Plaintiff's RFC:

16 [When determining a claimant's residual functional
17 capacity,] the undersigned must consider all symptoms,
18 including pain, and the extent to which these symptoms can
19 reasonably be accepted as consistent with the objective
20 medical evidence and other evidence based on the
21 requirements of 20 C.F.R. §§ 404.1529 and 416.929, and on
22 Social Security Ruling 96-7p. In cases such as this,
23 where the objective medical evidence alone fails to
24 substantiate subjective allegations of total incapacity to
25 work, 20 C.F.R. §§ 404.1529 and 416.929 emphasize the need
to go further and consider other relevant information
bearing on the issue of credibility. Included among other
factors to be considered are the claimant's subjective
complaints regarding the nature, onset, duration,
frequency, radiation and intensity of any pain,
precipitation and aggravating factors; type, dosage,
effectiveness and adverse side effects of any pain
medication; treatment other than medication for relief of
pain; functional restrictions and daily activities.

26 (Tr. 32.)

27 Plaintiff disputes the ALJ's determination that she retains the
28 residual functional capacity to perform work at all exertional

1 levels, as long as the work requires reaching or work overhead no
 2 more than occasionally. (Ct. Rec. 15 at 39-50.) The Commissioner
 3 responds that the RFC determination is supported by the medical
 4 evidence and by the ALJ's determination that Plaintiff is less than
 5 completely credible. (Ct. Rec. 20 at 5-7, 10-12.)

6 Plaintiff's argument with respect to the RFC is the same as her
 7 first argument: she disagrees with the way the ALJ weighed the
 8 medical testimony. Plaintiff does not challenge the ALJ's
 9 determination that she lacked credibility. Credibility
 10 determinations bear on the evaluation of medical evidence when an
 11 ALJ is presented with conflicting medical opinions. *Webb v.*
 12 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005). In this case the ALJ
 13 found that Plaintiff takes Tylenol, ibuprofen, PM medicines and
 14 herbal remedies for pain, but no prescription medication. (Tr. 33.)
 15 Plaintiff testified that her self esteem is low because she lost her
 16 job, cannot work, and lost her assets, but she has never been
 17 prescribed antidepressants or told to attend counseling. (Tr. 33.)
 18 Plaintiff testified that she had "swelling in her hands and feet her
 19 whole life, yet this is not supported in the record as examination
 20 by Dr. Heick indicated no swelling and other exams do not mention
 21 swelling of joints." (Tr. 34.) Plaintiff testified to numbness in
 22 her right arm and hand, lasting 20-30 minutes, particularly with
 23 activity such as lifting 10 pounds, "yet examinations at C33F⁵

24
 25 ⁵C33F is the record from Holy Family Hospital Emergency Center
 26 noting strong hand grip and "equal feeling and movement of the
 27 fingers," and a negative left shoulder x-ray, dated September 27,
 28 2002. (Tr. 511-513.)

1 indicate she had good hand grip and good sensation in her hands."
2 (Tr. 34.) With respect to activities, the ALJ notes that Plaintiff
3 prepares food, grocery shops, drives a manual vehicle, plays games
4 on the internet 2 hours a day, and reads for 2-3 hours a day. (Tr.
5 34.) The ALJ observed that Plaintiff shoveled sand on July 11,
6 2003. (Tr. 34, citing to Tr. 444.)

7 When the ALJ weighed the opinions of Dr. French and Dr.
8 Verhoogen, she properly considered that some of their assessments
9 were based in part on Plaintiff's inconsistent self-reporting. As
10 noted, Plaintiff does not challenge the ALJ's credibility
11 determination. The court finds that the ALJ appropriately
12 considered the medical evidence, as well as Plaintiff's credibility
13 in determining her residual functional capacity. With respect to
14 the ALJ's residual functional capacity assessment, the ALJ's reasons
15 for the limitations assessed are fully supported by the medical
16 evidence, objective test results, and by her credibility
17 determination. The ALJ's assessed RFC is supported by the record
18 and free of legal error.

19 **C. Vocational Expert**

20 Plaintiff contends that the ALJ's hypothetical question to the
21 vocational expert was flawed because it did not contain all of her
22 medically supported limitations. (Ct. Rec. 15 at 47-49). The
23 Commissioner responds that the ALJ included all of the impairments
24 established by the medical evidence. (Ct. Rec. 20 at 5-7).

25 Plaintiff's argument is the same as that previously raised,
26 that the ALJ did not weigh the medical evidence in the way she would
27 have wished. For the reasons articulated above, the court finds that
28 the ALJ's hypothetical, given as part of her alternative step five

1 analysis, included all of the limitations established by the medical
2 and other competent evidence of record.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's conclusions, this
5 court finds that the ALJ's decision is supported by substantial
6 evidence and free of legal error. Based on the foregoing, the
7 undersigned finds that the ALJ properly determined that Plaintiff is
8 not disabled within the meaning of the Social Security Act.
9 Accordingly,

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is
12 **DENIED**.

13 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**) is
14 **GRANTED**.

15 3. The District Court Executive is directed to enter judgment
16 in favor of Defendant, file this Order, provide a copy to counsel
17 for Plaintiff and Defendant, and **CLOSE** this file.

18 DATED January 23, 2007.

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S/ CYNTHIA IMBROGNO
21 UNITED STATES MAGISTRATE JUDGE
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